IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR MARICOPA COUNTY

STATE OF ARIZONA,	)	
	)	
Plaintiff,	)	No. CR 97-09555
	)	
vs.	)	
	)	
GARY MARTIN MCKEON,	)	SPECIAL VERDICT
	)	
Defendant.	)	
_____	)	

On August 4, 1999, a jury returned verdicts of "guilty" against Defendant Gary Martin McKeon concerning the following charges:

Count 1: Murder in the First Degree (George Michael Hild), a Class One Dangerous Felony, in violation of A.R.S. §§13-1101, -1105, -703, -801, and –604(P).

Count 2: Murder in the First Degree (Kerry Lynn Hild), a Class One Dangerous Felony, in violation of A.R.S. §§13-1101, -1105, -703, -801, and –604(P).

Count 3: Burglary in the First Degree, a Class Three Dangerous Felony, in violation of A.R.S. §§13-1501, -1508, -1506, -701, -702, and –801.

It is the judgment of the Court that Defendant is guilty of those crimes.

Pursuant to A.R.S. §13-703(B), the Court conducted a presentence hearing on March 22 and 23, 2000. Both the State and the Defendant were given the opportunity to present evidence and argument concerning the existence or non-existence of the aggravating and mitigating circumstances set forth in A.R.S. §13-703 (F) and (G). Both parties were given the opportunity to present evidence and argument concerning mitigating circumstances not specified in A.R.S. §13-703(G). In addition, the Court has considered the sentencing memoranda filed by the State and the Defendant. On agreement of the parties, no presentence report was ordered in this matter.

1. <u>Enmund/ Tison</u>

The verdicts do not indicate whether the jury convicted Defendant of premeditated murder or felony murder concerning either Count 1 or Count 2. Therefore, the Court must make findings pursuant to Enmund v. Florida, 458 U.S. 782 (1982), and Tison v. Arizona, 481 U.S. 137 (1987). The Court finds, beyond a reasonable doubt, that Defendant (1) killed, and (2) intended to kill, George Michael Hild and Kerry Lynn Hild.

2. Aggravating Circumstances

It is the State's burden to prove the existence of any aggravating circumstance it alleges. The standard is "proof beyond a reasonable doubt." Because the State has not alleged the aggravating circumstances set forth in A.R.S. §13-703(F)(1),(F)(4), (F)(5), (F)(7), (F)(9), and (F)(10), the Court finds that none of those aggravating circumstances exists.

A. A.R.S. §13-703(F)(2) (Previous conviction of a serious offense)

The State contends that it has established this aggravating circumstance in connection with Counts 1 and 2. The State's theory is that the verdict of "guilty" concerning Count 3, burglary in the first degree, constitutes a "previous conviction of a serious crime." A.R.S. §13-703(H) compels the conclusion that the crime in question is "serious," and Defendant does not suggest otherwise. Defendant contends that, because the conduct that gave rise to the conviction on Count 3 occurred "contemporaneously" with the conduct that culminated in "guilty" verdicts on Counts 1 and 2, the rationale that underlies §13-703(F)(2) militates against the conclusion that this circumstance exists here.

In State v. Gretzler, 135 Ariz. 42, 659 P.2d 1(1983), the Arizona Supreme Court noted that it is improper to consider a "contemporaneous" conviction that "ar[ises] out of the same set of events" as the subject murder as a "previous" conviction for purposes of applying A.R.S. §13-703(F)(1) or (F)(2). 135 Ariz. at 57, n.2. The supreme court has had several occasions to explain why convictions arising out of acts that occur after a murder can qualify under (F)(2), as long as the conviction is entered prior to the sentencing hearing on the murder. See, e.g., State v. McKinney, 185 Ariz. 567, 917 P.2d 1214 (1996); State v. Gretzler, supra. These cases stand for the proposition that the purpose of a sentencing hearing is to bring to light information concerning the defendant's character, thus enabling the court to impose a sentence that fits the offender as well as the offense. See also State v. Valencia, 124 Ariz. 139, 602 P.2d 807 (1979). Here, the Defendant unlawfully entered the Palmers' property for the purpose of killing George and Kerry. Although the burglary constitutes a separate crime, it is clear that the burglary conviction arose out of the same set of events as the murders. Because the burglary conviction does not constitute a "previous" conviction, it does not qualify under §13-703(F)(2).

The Court finds that this aggravating circumstance does not exist.

B. A.R.S. §13-703(F)(3) (Knowing creation of grave risk of death to persons other than the victims)

The State asserts that individuals other than George and Kerry, i.e., David Palmer, Shauna Palmer, and persons who lived or were otherwise present in the neighborhood, were within the "zone of danger" created by Defendant. Defendant responds that no one was within the zone of danger, and that, even if someone were, the State has not established that he **knowingly** created a grave risk of death in connection with any such person.

The evidence indicates that David Palmer was inside the residence for most, if not all, the period of time during which Defendant was firing his weapons toward George and Kerry. It further indicates that Shauna Palmer was inside the house during part of that period and in the front yard at other times during that same period. There is no concrete evidence available concerning the specific locations of persons who may have been in the neighborhood during that time frame.

As State's counsel candidly admits, this particular aggravating circumstance is not frequently found, and even when it is, it does not always survive the appellate process. The supreme court construes it narrowly, and for good reason. As the court suggested in State v. McMurtrey, 151 Ariz. 105, 108, 726 P.2d 202, 205 (1986) ("McMurtrey III"), failure to interpret and apply this circumstance in precise fashion renders it vulnerable to constitutional challenge.

A brief review of several cases will illustrate the approach the supreme court takes to this circumstance and provide a framework for the present analysis. In State v. Wood, 180 Ariz. 53, 881 P.2d 1158 (1994), the court held that this circumstance "applies only if the defendant's 'murderous act itself put other people in a zone of danger.'" 180 Ariz. at 69, 881 P.2d 1174 (citations omitted). Although the State

is not required to prove that a particular individual was "directly in the line of fire" in order to prevail, the circumstance does not apply, for example, to bystanders who happen to be in the area. Id. The critical question "is whether, during the course of the killing, the defendant knowingly engaged in conduct that created a real and substantial likelihood that a specific third person might suffer fatal injury." Id. State v. McMurtrey, supra, in which the defendant opened fire in a crowded room, represents a classic "zone of danger" scenario. See also State v. Doss, 116 Ariz. 156, 568 P.2d 1054 (1977). In State v. Smith, 146 Ariz. 491, 707 P.2d 289 (1985), the court distinguished between (1) deliberate, purposeful shootings, and (2) situations in which the fact that another person was not killed or seriously injured can only be characterized as fortuitous. In State v. Clark, 126 Ariz. 428, 616 P.2d 888 (1980), the court held that this circumstance was not present because the "other person" was in another room when the shooting occurred. "Even given the ricocheting of bullets, Mrs. Thumm was not close enough to be within any sort of 'zone of danger.'" 126 Ariz. at 436, 616 P.2d at 896. See also State v. Ceja, 115 Ariz. 413, 565 P.2d 1274 (1977).

It is important to remember that Defendant went to the Palmer residence for the very purpose of killing George and Kerry Hild. His murderous actions were anything but random or indiscriminate. Given the manner in which this circumstance has been interpreted by the supreme court, there is simply no basis for the claim that Defendant knowingly created a real and substantial likelihood that a neighbor or bystander might be killed. Although the State's argument that David and/or Shauna Palmer were within the "zone of danger" is stronger, it too must fail.

The Court finds that this aggravating circumstance does not exist.

C. A.R.S. §13-703(F)(6) (Murder committed in an especially heinous, cruel, or depraved manner)

The State contends that Defendant killed George and Kerry in an especially heinous, cruel, and depraved manner. With regard to the "cruelty" aspect, the State urges that, before they died, George suffered physical pain and Kerry suffered mental anguish. With respect to heinousness and depravity, the State asserts that the killings were senseless, that the victims were helpless, and that Defendant relished the killings, especially George's. The State also claims that Defendant inflicted gratuitous violence upon George. Defendant argues that the evidence, viewed in light of the applicable law, compels the conclusion that the State has failed to prove any aspect of this aggravating circumstance.

Several observations about this circumstance must precede the factual and legal analysis. First and foremost, the Court must proceed on the assumption that the legislature had a purpose in mind when it utilized the term "especially" in connection with each of the operative terms. State v. Ortiz, 131 Ariz. 195, 639 P.2d 1020 (1981), can certainly be read to suggest that, had the legislature not utilized such a qualifier, this aggravating circumstance would be susceptible to constitutional challenge. 131 Ariz. at 206, 639 P.2d at 1031. A principled approach to (F)(6) is critical, perhaps to a greater extent than for any other aggravating circumstance. Second, the supreme court has provided specific, objective definitions for each of the operative terms. In State v. Knapp, 114 Ariz. 531, 562 P.2d 704 (1977), the court provided the following definitions:

> "heinous: "hatefully or shockingly evil; grossly bad.
>
> cruel: disposed to inflict pain especially in a wanton, insensate or vindictive manner: sadistic.
>
> depraved: marked by debasement, corruption, perversion or deterioration."

114 Ariz. at 543, 562 P.2d at 716. Based on these definitions, it has long been the law in Arizona that the "cruelty" aspect focuses upon the physical pain and/or mental anguish visited upon the victim. By contrast, the inquiry whether a killing was committed in an especially heinous or depraved manner focuses upon the killer's state of mind as evidenced by his words and conduct. See, e.g., State v. Medrano, 173 Ariz. 393,

844 P.2d 560 (1992). Third, because the terms are set forth in the disjunctive, the State need prove only one of them for this aggravating circumstance to exist. Id.

1. Did Defendant commit either murder in an especially cruel manner?

The evidence does not establish that Defendant caused either George or Kerry to suffer inordinate or prolonged physical pain. With respect to the claim that Defendant caused Kerry mental anguish by forcing her to watch George die before she was killed, the Court agrees that such a scenario can lead to the finding that a murder was committed in an "especially cruel" manner. See State v. Smith, 193 Ariz. 452, 974 P.2d 431 (1999); State v. Kiles, 175 Ariz. 358, 371, 857 P.2d 1212, 1225 (1993). However, the evidence does not establish, beyond a reasonable doubt, that Kerry witnessed George die before Defendant killed her. There is a possibility that she did, but the law requires more. The State has not proved that Defendant committed either murder in an especially cruel manner.

2. Did Defendant commit either murder in an especially heinous or depraved manner?

In State v. Gretzler, supra, the supreme court identified five factors that are to be considered in determining whether a murder was committed in an especially heinous or depraved manner: (1) the apparent relishing of the murder by the killer; (2) the infliction of gratuitous violence on the victim; (3) the mutilation of the victim; (4) the senselessness of the murder; and (5) the helplessness of the victim. 135 Ariz. at 51-53, 689 P.2d at 10-12.

The State asserts that it has proved factors 1, 2, 4, and 5 with respect to George and factors 4 and 5 with respect to Kerry. Although the Court rejects Defendant's assertion that a killer cannot "relish" an act until after it has occurred, Defendant's statement about how he intended to kill George in front of Kerry was just that: a statement of intent. It does not compel the conclusion that Defendant relished either killing. Although Defendant shot George several times, that does not establish "gratuitous violence." In State v. Jones, 185 Ariz. 471, 917 P.2d 200 (1996), the court defined "gratuitous violence" as "violence clearly beyond that necessary to cause death." 185 Ariz. at 488, 917 P.2d at 217. Comparing what happened here to what occurred in Jones and in State v. Detrich, 188 Ariz. 57, 932 P.2d 1328 (1997), the Court concludes that Defendant did not inflict gratuitous violence upon George.

Both murders were "senseless" as that term is commonly understood. However, for purposes of determining the applicability of this circumstance, the supreme court has held that a murder "is senseless when it is unnecessary to allow the defendant to complete his objective." State v. Ross, 180 Ariz. 598, 605, 886 P.2d 1354, 1361 (1994); see also State v. Detrich, supra. Because Defendant's objective was to kill George and Kerry, neither murder was "senseless" as that term is defined for this purpose. In view of cases like State v. Hyde, 186 Ariz. 252, 921 P.2d 655 (1996), and State v. Murray, 184 Ariz. 9, 906 P.2d 542 (1995), where the victims were particularly vulnerable because of age or physical limitations, the burden of establishing that either George or Kerry was "helpless" is a heavy one. However, because a showing that the victim was helpless is insufficient, in and of itself, to establish that a murder was committed in an especially heinous or depraved manner, there is no need to inquire further. See State v. Trostle, 191 Ariz. 4, 951 P.2d 869 (1997).

The State has not proved that Defendant committed either murder in an especially heinous or depraved manner.

The Court finds that this aggravating circumstance does not exist.

D. A.R.S. §13-703(F)(8) (Other homicide committed during course of subject murder)

Each murder was committed during the course of the other, and Defendant concedes that this aggravating circumstance has been established.

The Court finds, beyond a reasonable doubt, that this aggravating circumstance exists in connection with each murder.

3. Mitigating Circumstances

Defendant contends that ten mitigating circumstances exist, two of which are "statutory" and eight "non-statutory." The Court will address each circumstance urged by Defendant and two additional non-statutory mitigating circumstances.

Mitigating evidence is defined as "any aspect of the defendant's character or record and any circumstance of the offense *relevant* to determining whether a sentence less than death might be appropriate." State v. Clabourne, 194 Ariz. 379, 388, 983 P.2d 748, 757 (1999)(citations omitted) (emphasis in original). Although a court "must consider any proffered evidence, it should not accept it as mitigating unless (1) the defendant has proven the fact or circumstance by a preponderance of the evidence (citation omitted), and (2) the court has determined that it is in some way mitigating." Id.

A. A.R.S. §13-703(G)(1) (Impaired Capacity)

Defendant urges that his "capacity to appreciate the wrongfulness of his conduct, and his ability to conform his conduct to the requirements of the law, was [sic] impaired by his drug use, by his psychological and emotional status, and by a combination of the two." Defendant's Sentencing Memorandum, p. 8, ll. 25-27. Defendant is cognizant of the fact that, to prove the existence of this statutory mitigating circumstance, he must show *significant* impairment.

Evidence adduced at trial indicates that, at various points in time before August 16, 1997, three medications were prescribed for Defendant. The evidence concerning the frequency and degree of regularity with which he took the medications is unclear. Even if concrete evidence were available in that regard, it would be incumbent upon Defendant to show a causal relationship between the ingestion of the medications and his conduct on August 16, 1997. State v. Clabourne, supra, 194 Ariz. at 385, 983 P.2d at 754; see also State v. Rienhardt, 190 Ariz. 579, 951 P.2d 454 (1997). Based on the evidence, the Court cannot and does not find, by a preponderance of the evidence, that Defendant's medications significantly impaired his capacity to appreciate the wrongfulness of his conduct or his ability to conform his conduct to the requirements of law.

Defendant's psychological and emotional condition must also be examined. Testimony given during the trial and the presentence hearing, as well as written material provided by Defendant (see Exhibits to Sentencing Memorandum, filed on or about March 15, 2000), paint the picture of a man who was not merely depressed by the circumstances surrounding the end of his long-term marriage to Kerry and what he saw as the destruction of his family, but tormented by them. The Court concludes that Defendant's psychological and emotional condition significantly impaired both his capacity to appreciate the wrongfulness of his conduct *and* his ability to conform his conduct to the requirements of law.

The Court finds that this statutory mitigating circumstance exists.

B. A.R.S. §13-703(G)(2) (Unusual and substantial duress)

Defendant contends that he was under unusual and substantial duress when he killed George and Kerry. He claims that David Palmer and George were armed when he arrived, thus forcing him to open fire. In State v. Clabourne, supra, the court cited State v. Castaneda, 150 Ariz. 382, 394, 724 P.2d 1, 13 (1986), for the proposition that, to prove the existence of this mitigating circumstance, a defendant must show that he was "coerce[d] or induce[d] [by] another person to do something against his will." 194 Ariz.

at 386, 983 P.2d at 755. Because this claim is contradicted by the evidence, the Court finds that this statutory mitigating circumstance does not exist.

C. Authoritarian Upbringing

Defendant asserts that his upbringing constitutes a mitigating circumstance. The State disputes the claim, noting that the evidence shows that Defendant was raised in a loving, supportive environment. These characterizations are not mutually exclusive; in the Court's view, there is evidence to support both. The fact that some defendants offer a dysfunctional family situation as mitigation does not foreclose the argument that what appears, at least on the surface, to be a more benign upbringing can also constitute mitigation.

In State v. Sharp, 193 Ariz. 414, 973 P.2d 1171 (1999), the defendant offered evidence concerning what the supreme court characterized as a "horrific" childhood. 193 Ariz. at 425, 973 P.2d at 1182. The court affirmed the trial judge's rejection of Sharp's claim for two reasons: (1) the claim was based solely on self-reported evidence, and (2) Sharp failed to establish a causal connection between his childhood and the murder. Defendant's claim suffers from neither infirmity. Live testimony and letters from several individuals bear witness to the fact that Defendant was raised in an extraordinarily authoritarian environment. This environment caused Defendant to think in black-and-white terms in all phases of life, and contributed to his inability to conform his behavior to society's rules.

The Court finds that this mitigating circumstance exists.

D. Loss of Identity

The Court finds that this mitigating circumstance exists.

E. Laudable Employment History

The Court finds that this mitigating circumstance exists.

F. Support By and For His Children

The Court finds that this mitigating circumstance exists.

G. Good Character and Aberrant Nature of Conduct

The Court finds that Defendant's good character and past good conduct exists as a mitigating circumstance. State v. Williams , 183 Ariz. 368, 904 P.2d 437 (1995). Based on the analysis set forth in State v. White, 194 Ariz. 344, 351-52, 982 P.2d 819, 826-27 (1999), the Court finds that the aberrant nature of Defendant's conduct on August 16, 1997, does not exist as a mitigating circumstance.

H. Lack of Felony Record

The Court finds that this mitigating circumstance exists.

I. Model Inmate

The Court finds that this mitigating circumstance exists.

J. Insufficient Evidence of Premeditation

Because the evidence clearly establishes that Defendant premeditated both murders, the Court finds that this mitigating circumstance does not exist.

K. Impaired Capacity

Although the Court has rejected Defendant's claim, pursuant to A.R.S. §13-703(G)(1), that his medications significantly impaired his capacity to appreciate the wrongfulness of his conduct and his ability to conform his conduct to the requirements of law, the Court must consider whether the evidence warrants a finding of impairment in either respect as a non-statutory mitigating circumstance. State v. Gallegos, 178 Ariz. 1, 870 P.2d 1097 (1994). For the reasons expressed in connection with Defendant's claim pursuant to (G)(1), the Court concludes that he has not shown impairment by reason of ingestion of medication.

The Court finds that this mitigating circumstance does not exist.

L. Substantial Stress

Although the Court has rejected Defendant's claim that he was under unusual and substantial duress at the time of the murders, the Court concludes, based on the evidence and pursuant to State v. Gallegos, supra, and State v. Gulbrandson, 184 Ariz. 46, 906 P.2d 579 (1995), that Defendant suffered from extraordinary stress. Furthermore, Defendant has established a nexus between that stress and the events of August 16, 1997.

The Court finds that this mitigating circumstance exists.

4. Weighing Process

Because the State has established one aggravating circumstance and Defendant has established several mitigating circumstances, the question before the Court is whether the mitigating circumstances are sufficiently substantial to call for leniency. This determination is made not on the basis of the number of aggravating and mitigating circumstances that exist, but on the basis of their magnitude and gravity. This aspect of the trial judge's task was addressed in State v. White, supra:

> If more than one mitigating factor is found, such factors are weighed both separately and cumulatively against the evidence of aggravation.

194 Ariz. at 350, 982 P.2d at 825.

Although only one aggravating circumstance has been established, it is entitled to considerable weight. Because of Defendant's deliberate and wanton conduct, two people are dead.

None of the mitigating circumstances excuses Defendant's conduct, and he does not offer them as excuses.

The following mitigating circumstances are entitled to substantial weight: (1) Defendant's significantly impaired capacity to appreciate the wrongfulness of his conduct and ability to conform

his conduct to the requirements of law by reason of his psychological and emotional condition; (2) Defendant's laudable employment history; (3) support by, and for, Defendant's children; and (4) Defendant's good character and past good conduct.

The following mitigating circumstances are entitled to some weight: (1) Defendant's authoritarian upbringing; (2) Defendant's loss of identity; and (3) Defendant's "model inmate" status.

The following mitigating circumstances are entitled to minimal weight: (1) Defendant's lack of felony record, and (2) substantial stress. Defendant's lack of felony record is entitled to minimal weight for two reasons. First, he has been convicted of a misdemeanor. Second, the Court has found Defendant's past good conduct as a mitigating circumstance; to that extent, the absence of a serious criminal record is redundant. The " substantial stress" factor is entitled to minimal weight for the same reason, bearing in mind that the Court has found, as a mitigating circumstance, Defendant's significantly impaired capacity to appreciate the wrongfulness of his conduct and ability to conform his conduct to the requirements of law by reason of his psychological and emotional condition.

When balanced against the aggravating circumstance, no single mitigating circumstance is sufficiently substantial to call for leniency. However, when the mitigating circumstances are weighed cumulatively against the aggravating circumstance, which the law requires, they are, indeed, sufficiently substantial to call for leniency.

IT IS ORDERED, pursuant to A.R.S. §13-703(A), that as punishment for Count I, first-degree murder of George Michael Hild, Defendant shall be imprisoned in the custody of the Arizona Department of Corrections for the remainder of his natural life. This sentence is not subject to commutation, parole, work furlough, or work release.

IT IS FURTHER ORDERED, pursuant to A.R.S. §13-703(A), that as punishment for Count II, first-degree murder of Kerry Lynn Hild, Defendant shall be imprisoned in the custody of the Arizona Department of Corrections for the remainder of his natural life. This sentence is not subject to commutation, parole, work furlough, or work release.

IT IS FURTHER ORDERED that the sentence imposed in connection with Count II shall run **consecutively** to the sentence imposed in connection with Count I.

IT IS FURTHER ORDERED that, as punishment for Count III, Defendant shall be imprisoned in the custody of the Arizona Department of Corrections for the presumptive term of 7.5 years, with credit for presentence incarceration in the amount of 967 days.

IT IS FURTHER ORDERED that the sentence imposed in connection with Count III shall run **concurrently** with the sentence imposed in connection with Count I.

DATED this 10th day of April, 2000.

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David R. Cole
Judge of the Superior Court